

## AMENDMENTS TO RULE 37

Rule 37 is amended as follows:

RULE 37. Failure To Make **Disclosure** or Cooperate in Discovery[==]:  
Sanctions

(a) Motion for Order Compelling **Disclosure or** Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling **disclosure or** discovery as follows:

(1) Motion.

**(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.**

**(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(4) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.** When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

~~[If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).]~~

(2) Evasive or Incomplete **Disclosure**, Answer[-], or Response

For purposes of this subdivision an evasive or incomplete **disclosure, answer, or response** is to be treated as a failure to **disclose, answer[-], or respond.**

(3) [~~Award of Expenses of Motion.~~] **Expenses and Sanctions.**

(A) If the motion is granted~~[-]~~ **or if the disclosure or requested discovery is provided after the motion was filed,** the court shall, after [~~opportunity for hearing~~] **affording an opportunity to be heard,**, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in [~~obtaining the order~~] **making the motion,** including attorney's fees, unless the court finds that the [~~opposition to the motion~~] **motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection** was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court [~~shall, after opportunity for hearing,~~] **may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard,** require the moving party or the attorney [~~advising such conduct~~] or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may **enter any protective order authorized under Rule 36(c) and may, after affording an opportunity to be heard,** apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure To Comply With Order: **Sanctions.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court. If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b)~~(4)~~ **(6)** or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35 or if a

party fails to obey an order entered under Rule 26(f), the court may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting [him] that party from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders[+] except an order to submit to a physical or mental examination.

(5) Where a party has failed to comply with an order Rule 35(a) requiring the party to produce another for examination, such orders as are listed in paragraphs (1), (2) and (3) of this subdivision (b), unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.**

**~~[(c) Expenses on Failure to Admit.]~~ (c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**

**(1) A party that without substantial justification fails to**

disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under paragraphs (1), (2), and (3) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that [ ~~(1)~~ ] (A) the request was held objectionable pursuant to Rule 36(a), or [ ~~(2)~~ ] (B) the admission sought was of no substantial importance, or [ ~~(3)~~ ] (C) the party failing to admit had reasonable ground to believe that [ ~~he~~ ] **the party** might prevail on the matter, or [ ~~(4)~~ ] (D) there was other good reason for the failure to admit.

(d) Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) [ ~~(4)~~ ] (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions (b)(1), (b)(2) and (b)(3) of this rule. **Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action.** In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

~~—— (e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in 28 U.S.C. § 1783, under the circumstances and conditions therein stated. ——~~

**(e) [Abrogated]**

(f) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the ~~[framing of a discovery plan by agreement as is]~~ **development and submission of a proposed discovery plan as** required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **\_\_\_\_, 2000, eff. \_\_\_\_, 2000.**)

**ADVISORY COMMITTEE NOTE**

Under proposed Rule 37(a)(1)(A) (taken from Fed. R. Civ. P. 37(a)(2)(A)), a party who fails to make disclosure is subject to sanctions, following motion and certification by the opposing party that the movant has in good faith conferred or attempted to confer with the other party to secure disclosure without court action. Sanctions are also available under proposed Rule 37(a)(1)(B) for failure to respond to discovery requests. The movant must certify that it has conferred or attempted to confer with the person or party failing to make discovery in an effort to secure the information without court action.

Under proposed Rule 37(c), a party who, without substantial justification, fails to disclose information required by Rule 26(a) or 26(e)(1) is precluded from using as evidence at a trial, hearing or on a motion any witness or information not disclosed and may be subject to additional sanctions.

USCIT R. 37(e) should not been retained. The subdivision was abrogated from the Fed. R. Civ. P. in 1980, according to the Fed. R. Civ. P. Advisory Committee Notes, because Title 28, U.S.C. section 1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45 (e)(2).